BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION

OF THE STATE OF CALIFORNIA

In the Matter of the Accusation of the DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING v. HOLMES MANAGEMENT, INC. dba CASSIDY'S FAMILY RESTAURANT, Respondent. SHERRY RITCHEY, Complainant.	Case No. E1999 00-E-0404-00-pe C00-01-049 02-08-P DECISION

Hearing Officer Jo Anne Frankfurt heard this matter on behalf of the Fair Employment and Housing Commission on December 18 through 20, 2000, in Chico, California. Jodi Clary, Staff Counsel, represented the Department of Fair Employment and Housing. Jerry P. Shaw, of Shaw Investigation and Research, represented respondent Holmes Management, Inc., dba Cassidy's Family Restaurant. Complainant Sherry Ritchey and respondent's representative Judy Cottingham were present throughout the hearing.

The Commission received the hearing transcript on February 14, 2001. The record was held open for the filing of post-hearing briefs, which were timely filed with the Commission on May 17, 2001, and the matter was submitted on that date**.** Hearing Officer Frankfurt issued a proposed decision in this matter on August 3, 2001.

On September 10, 2001, the Commission decided not to adopt the proposed decision and notified the parties of the opportunity to file further argument by October 10, 2001. The parties timely filed written argument.

After consideration of the entire record, the Commission makes the following findings of fact, determination of issues, and order.

FINDINGS OF FACT

1. On September 23, 1999, Sherry Ritchey (complainant) filed a written, verified complaint with the Department of Fair Employment and Housing (Department) alleging that, within the preceding one year, Cassidy's Family Restaurant terminated complainant's employment due to a perceived leg and knee physical disability, in violation of the Fair Employment and Housing Act (FEHA or Act). (Gov. Code, §12900 et seq.)

2. On June 30, 2000, complainant filed an amended, verified complaint with the Department alleging that, within the preceding one year, Cassidy's Family Restaurant had denied complainant medical care leave and terminated her employment in violation of the California Family Rights Act (CFRA). (Gov. Code, §§12945.1 and 12945.2.) The amended complaint also realleged that Cassidy's Family Restaurant had unlawfully terminated complainant's employment due to a perceived leg and knee physical disability.

3. The Department is an administrative agency empowered to issue accusations under Government Code section 12930, subdivision (h). On September 22, 2000, Dennis W. Hayashi, in his official capacity as Director of the Department, issued an accusation against Holmes Management, Inc., dba Cassidy's Family Restaurant (respondent). The accusation alleged that respondent violated complainant's CFRA rights and also unlawfully terminated complainant's employment because respondent perceived that complainant had a disability. The accusation alleged that respondent's conduct violated FEHA and Government Code section 12945.2.

4. On October 10, 2000, the Department issued a first amended accusation which added that respondent violated complainant's rights under Government Code section 12940, subdivisions (a) and (k), by discriminating against complainant on the basis of a perceived disability and by failing to provide reasonable accommodation.

5. At all pertinent times herein, respondent Holmes Management, Inc. was a corporation operating two restaurants—one in Chico, California, (Chico Cassidy's) and the other in Oroville, California (Oroville Cassidy's). Keith Holmes was respondent's president and sole stockholder.

6. At all pertinent times herein, respondent was an "employer" within the meaning of FEHA and a "covered employer" under CFRA. Complainant worked 1,250 hours in the year prior to July 27, 1999, and qualified as an "eligible employee" under CFRA.

7. In August 1994, complainant began working at Oroville Cassidy's, which was about to open as a new restaurant. Complainant worked long hours, doing many start-up tasks. Initially, respondent paid complainant an hourly wage, but quickly promoted her to manager and paid her a salary of $1,500 per month. Thereafter, complainant received an increase in salary to $1,800 per month.

8. Complainant is a high school graduate who, at the time of hearing, was 59 years old. Prior to working at Oroville Cassidy's, complainant had worked for over a year at a restaurant in Elk Grove, California, which was partially owned by Keith Holmes.

9. In or around August 1995, Keith Holmes opened Chico Cassidy's.

10. In late 1995 or early 1996, complainant became general manager of Oroville Cassidy's. Complainant's salary increased to $2,000 per month.

11. In June 1997, John McKay and James Kirk worked as managers at Oroville Cassidy's. That month, respondent hired Judy Cottingham as an additional manager. Cottingham's previous experience included approximately 18 years as a full-time nurse and office manager for a physician.

12. Oroville Cassidy's had an informal medical leave policy. If an employee or manager requested a leave, management found another worker to cover the employee's shift. When an employee or manager sought a leave of absence, respondent did not require any type of medical certification.

13. At all relevant times herein, neither complainant nor any other manager, general manager, or supervisor at Oroville Cassidy's received any training about disability discrimination laws or CFRA.

14. In December 1998, complainant was still working as general manager at Oroville Cassidy's. Complainant lived with her son, James Ritchey, her daughter-in-law, Tina Ritchey, and complainant's grandchild. James Ritchey, who had previously been a manager for a year at Oroville Cassidy's, was now a manager at Chico Cassidy's.

15. In January 1999, one of complainant's knees began to swell, became painful, and, as a result, made it difficult for her to walk. She went to a doctor, who took x-rays and diagnosed her condition as a "Baker's cyst" behind her knee. A Baker's cyst is a formation of fatty tissue that can cause pain. To treat this condition, complainant needed to elevate her leg at home. Complainant told Keith Holmes that she would need some time off for the Baker's cyst. He responded by telling her not to worry about it, that she should take the time she needed, and come back when she was able. Respondent did not require any medical certification for this leave. Respondent also did not advise complainant of her CFRA leave rights and did not designate the leave as a CFRA leave.

16. In early January 1999, complainant commenced a leave of absence for the Baker's cyst. Upon receiving a medical release, complainant returned to work as general manager for Oroville Cassidy's in early February 1999.

17. In March 1999, Keith Holmes told manager Judy Cottingham that complainant's condition had resulted in her not being at the restaurant as much as he had hoped. Holmes offered Cottingham the general manager position and she accepted.

18. In March 1999, Keith Holmes told complainant that he was replacing her as general manager but would not reduce her salary. Complainant asked Holmes what the problem was and if she had done anything wrong. He said that she had not done anything wrong but he needed "new blood." Thereafter in March 1999, Judy Cottingham became general manager at Oroville Cassidy's and complainant was demoted to a manager position.

19. By April 1999, complainant developed a Baker's cyst behind her other knee, again requiring her to elevate her leg and take time off from work. As a result, complainant went on leave for the month of April and returned by May 1, 1999. Respondent did not require any medical certification for the leave and did not designate the leave as a CFRA leave.

20. In or around July 1999, John McKay oversaw the operations of Orville Cassidy's. In this capacity, McKay supervised the managers and general manager. Along with Keith Holmes, McKay made personnel decisions about these employees.

21. On July 24, 1999, Judy Cottingham and complainant were working at Oroville Cassidy's. Cottingham heard from staff that complainant's leg looked "really bad" and that complainant seemed to be in extreme pain. Cottingham approached complainant and looked at complainant's leg. Complainant acknowledged that she was in pain. Relying upon her previous experience as a nurse, Cottingham told complainant that she might have "phlebitis . . . a blood clot." Cottingham also told complainant that her condition was serious and asked her to go home. Reluctant to leave, complainant initially stayed at work, elevating her leg. Cottingham finally convinced complainant to leave the restaurant, telling her to see a doctor.

22. After seeing complainant, Cottingham called John McKay and told him that complainant had a serious problem with her leg. McKay knew that Cottingham previously had been a nurse. That day, both Cottingham and McKay made a number of telephone calls to complainant, asking how she was doing and whether she had sought medical attention.

23. On July 24 or 25, 1999, complainant went to an emergency clinic. The clinic staff told her to go home, where she should "ice and elevate" her leg. The clinic also made an appointment for complainant to see Dr. Eva Jalkotzy, a licensed physician.

24. On July 25, 1999, respondent put complainant on medical leave. Respondent did not require complainant to fill out any paperwork for the leave, request any medical certification, or designate the leave as a CFRA leave.

25. On July 27, 1999, complainant saw Dr. Eva Jalkotzy at the Community Comprehensive Care Clinic in Oroville, California. Dr. Jalkotzy examined complainant, noted a "tender nodularity on complainant's left thigh" and diagnosed complainant as having

thrombophlebitis, an inflammation of the veins. Dr. Jalkotzy prescribed antibiotics, anti-inflamatories and Coumadin, a blood thinner. She also told complainant to return in one week.

26. After seeing Dr. Jalkotzy, complainant called Judy Cottingham, confirming that complainant would remain off work for a while. Complainant told Cottingham that she had sought medical care, and if her condition did not improve, she might need additional treatment. This information did not surprise Cottingham.

27. On August 3, 1999, complainant returned to see Dr. Jalkotzky, who was concerned because complainant's condition had worsened. Dr. Jalkotzky prescribed a new antibiotic and told complainant that if she did not improve, she should go to the emergency room.

28. Complainant's condition did not improve, and the next day she went to Oroville Hospital where, beginning August 4, 1999, she received outpatient intravenous antibiotics and had one or more sonograms.

29. On August 5 and 6, 1999, complainant again received intravenous antibiotics. In addition, on August 5, 1999, complainant saw Kim Hanson, Dr. Jalkotzy's nurse practitioner.

30. Sometime between August 4, 1999, and August 6, 1999, John McKay visited complainant at Oroville Hospital. When he saw complainant, an intravenous line was still in her arm and she was being wheeled back after having her sonogram. McKay and complainant did not talk about her condition but she did show him her leg, which he thought looked "really bad."

31. While at the hospital, John McKay thought he overheard a doctor talking about complainant, saying that complainant needed to find a desk job and that she could develop a blood clot if she did not continue her treatments. After this, McKay believed that complainant had a terminal condition. McKay came to this belief even though he never spoke with any doctor or had access to any of complainant's medical reports.

32. John McKay talked with Keith Holmes and Judy Cottingham about what he believed he had heard the doctor say at the hospital. They were concerned about complainant's absences and how that would impact the remainder of the year at the restaurant. Holmes and McKay decided to remove complainant from her manager position and that she needed a desk job. They considered having her handle the payroll and help with some bookkeeping.

33. On August 13, 1999, complainant again saw nurse practitioner Kim Hanson for complainant's thrombophlebitis.

34. On August 15 or 16, 1999, John McKay went to complainant's home. During his visit, McKay asked complainant if she had thought about retiring. Complainant said no, she

liked her job. McKay told complainant that if she retired, she could handle respondent's payroll. He did not specify the wage she would earn, her hours or where she would work. Complainant replied that she was not interested, and said she was going back to work. McKay told complainant that she need not decide at that moment, and could let him know by the end of the month. Complainant said she did not think there was anything more to talk about and that she would be returning to work as manager at the end of the month.

35. By August 26, 1999, complainant was feeling much better. Her leg was no longer swollen, the thrombophlebitis had diminished, and the pain was gone. That day, she again saw nurse practitioner Kim Hanson, who told complainant that she would be fine and could return to work. Complainant asked if she could do everything she had done previously at work and Hanson replied, "no problem." Hanson gave complainant a written release stating that she could return to work by September 1, 1999, without any restrictions.

36. On either August 26 or 27, 1999, complainant went to Oroville Cassidy's and gave the written release to manager James Kirk. Complainant told Kirk that it was her release, and that she would be back to work on September 1, 1999. Kirk said "okay." At complainant's request, Kirk put the release on the bulletin board.

37. In August 1999, Keith Holmes and John McKay spoke with complainant's son, James Ritchey. They asked Ritchey to convince complainant to quit her job, saying that she should not be working in her condition. Holmes and McKay also told Ritchey that if complainant returned to work, they felt she would reinjure herself or be unable to perform her duties. Ritchey told them that complainant wanted to return to work. Ritchey also stated that complainant's doctor was in a better position to judge the situation and that her doctor had said she was able to return to work.

38. On the evening of August 30, 1999, Judy Cottingham returned to Oroville Cassidy's after a 10-day vacation. At the restaurant, Cottingham saw complainant's release pinned onto the bulletin board.

39. By September 1, 1999, Keith Holmes and John McKay had decided to terminate complainant's employment and fill her manager position with Richard Cottingham, Judy Cottingham's husband. On that date, Keith Holmes issued a memorandum to all management, kitchen staff, servers, bussers and cashiers. The memorandum, which had been written by John McKay at Holmes' direction, stated:

> …as you all know Sherry [complainant] has not been at work lately. She has been battling serious health problems all year. In order for her to focus on her health issues and to assist on her recovery, I have urged her to
> retire from Cassidy's.

The memorandum also stated that Holmes had chosen Richard Cottingham to be the "third full-time manager."

40. On September 1, 1999, complainant arrived at Oroville Cassidy's, ready for work. John McKay asked complainant if she had thought about their previous discussion at her home. Complainant said there was nothing to discuss, because she wanted to continue working. McKay handed complainant the September 1, 1999, memorandum, which she read. Complainant asked what the problem was and McKay said he had to fire her. Complainant said, "I guess I'm terminated;" McKay responded affirmatively. Complainant asked why she was terminated and McKay said that he was worried about her health. Complainant then left, crying. Hurt and angry, complainant drove home.

41. At home, complainant told her son, daughter-in-law and grandchild that she had been fired. Complainant was a self-described "basket case," so upset that she was almost hyperventilating. Complainant went to her room, not wanting her family to see her cry. She stayed in her room, not engaging in her normal activities such as working at her desk, talking to her son and daughter-in-law, playing with her grandchild or cooking dinner. Upset that respondent had terminated complainant, that day James Ritchey immediately quit his position as a manager for respondent.

42. During the next few weeks, complainant continued to stay in her room and keep to herself. She was devastated and depressed, feeling hurt, anger and disbelief. During her infrequent talks with her daughter-in-law, complainant expressed these feelings. Upset and crying, complainant exhibited similar emotions when she told close friends Ken Stromley and Sharon Manthe that respondent had terminated her employment.

43. For the next several months, complainant did very little except look for work. She remained depressed and could not pull herself out of it. She did not feel comfortable approaching people and did not "feel human."

44. When respondent terminated complainant's employment, she earned a salary of $2000 per month. Her average bonus was $140 per month. After her termination, complainant received unemployment benefits of $230 per week for six months. While receiving unemployment insurance, complainant sought work.

45. As a result of the termination, complainant's personality and behavior changed. Previously, she had been a happy, energetic, and outspoken woman who liked doing things with others, and loved to work. She had often talked about Oroville Cassidy's, saying she liked her job and enjoyed working there.

46. Complainant's termination was devastating because her life had revolved around work and she had devoted most of her time to Oroville Cassidy's. Respondent's conduct resulted in complainant losing trust in people; she had considered respondent "family" who would take care of her. Complainant also lost self-confidence, not understanding what she had done to cause the termination.

47. Sometime around April 2000, complainant moved to Sacramento, California. She could not afford a place of her own, and, instead, lived in a room of a house owned by Sharon Manthe and another friend. Complainant put most of her possessions in storage, where they remained at the time of hearing, and borrowed money from friend Ken Stromley for expenses. Complainant also took legal action to obtain retirement money owed to her by her ex-husband.

48. In Sacramento, complainant found that most jobs required computer skills, and she decided to attend school, studying computer technologies. As of the date of hearing, complainant continued to take courses in this field.

49. As of the date of hearing, complainant still lived in a room of Sharon Manthe's home. Complainant remained withdrawn and unhappy. She is "not the person" she used to be.

DETERMINATION OF ISSUES

Jurisdiction

A. Timeliness of Accusation

Respondent argues that the Department did not timely issue or file the accusation. Commission regulations state, "An accusation shall be deemed issued on the date it is filed with the Commission . . . and . . . shall be filed with the Commission in the manner set forth in section 7406." (Cal. Code Regs., tit. 2, §7408, subd. (b).) Section 7406, subdivision (b), provides, "Filing of a document is effective if the document is mailed to the Commission by first class, overnight or express mail, registered, or certified mail, postmarked no later than the last day of the time limit. Where mail is metered and bears a later postmark, the date of the postmark shall control for timeliness purposes." (Cal. Code Regs., tit. 2, §7406, subd. (b).)

An accusation must be issued "on or before the one-year anniversary date of the filing of the complaint." (Cal. Code Regs., tit. 2, §7408, subd. (c).) Here, the complaint was filed on September 23, 1999. On September 22, 2000, the accusation was dated, signed and mailed to the Commission.[1] Because this is within the one year anniversary date of filing the complaint, the Department issued and filed the accusation with the Commission in a timely manner. Accordingly, the accusation will not be dismissed on timeliness grounds. [2]

[1] The accusation in this case is accompanied by a proof of service, executed on September 22, 2000, which verifies that the document was sent on that date to the Commission by certified mail. In addition, the envelope in the Commission's Decision File containing the accusation bears a meter mark dated September 22, 2000.

[2] The Department's amended accusation also is timely. Commission regulations provide that the Department may amend an accusation with new charges any time "up to 30 calendar days prior to

B. Right to a Jury Trial

Respondent argues that it is entitled to a jury trial because the Department seeks emotional distress damages and an administrative fine. The Act is a comprehensive statutory scheme that allows cases brought against respondents to be heard in Superior Court, provided that they timely "opt out" of the administrative process. Government Code section 12965, subdivision (c)(1), provides that within 30 days of service of an accusation that contains a prayer for damages for emotional injuries or administrative fines, a respondent may elect to transfer the matter to court instead of having the matter heard by the Commission. A respondent makes this election by serving written notice on the Department, the Commission and the person claiming to be aggrieved, within the 30-day time period. (Gov. Code, §12965, subd. (c)(1); Cal. Code Regs., tit. 2, §7410, subd. (a).)

In this case, respondent had the option to have this matter heard by a jury in civil court but did not elect to transfer this matter to that court. Thus, this case is properly before the Commission.

C. Investigation within 100 Days

Respondent also argues that the accusation should be dismissed because Government Code sections 12980 and 12981, subdivisions (a) and (c), require the Department to notify the parties if an accusation is not issued within 100 days after filing a complaint.

Government Code sections 12980 and 12981, however, govern housing discrimination, and there is no equivalent or corresponding rule for employment discrimination cases before the Commission. Thus, the motion to dismiss on this ground is denied.

Liability

A. CFRA Leave

CFRA grants eligible employees the right to take up to 12 weeks of leave in any 12-month period for the employee's own serious health condition. [3] (Gov. Code, §12945.2, subd. (a); Cal. Code Regs., tit. 2, §7297.0, subd. (k).) The Department asserts that respondent violated CFRA by failing to notify complainant of her rights under the Act, failing to designate her medical leave as CFRA leave and failing to return complainant to the

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the . . . date the hearing is scheduled to commence." (Cal. Code Regs., tit. 2, §7409, subd. (b).) The Department exercised that right, amending the accusation on October 10, 2000, for a hearing held on December 18, 2000. The theories of liability in the amended accusation arose out of the same injury and factual allegations as in the initial accusation, and thus the amended accusation relates back to the original date of filing. (*Dudley v. Dept. of Transportation* (2001) __ Cal.App.4th __ [108 Cal.Rptr. 739, 748].)

[3] The Moore-Brown-Roberti Family Rights Act of 1993 is commonly referred to as the California Family Rights Act, or CFRA. (Cal. Code Regs., tit. 2, §7297.0, subd. (b).)

same or comparable position she held before her July/August 1999 leave of absence. Respondent argues that complainant did not give respondent adequate notice of her need for a CFRA leave and that complainant's leave exceeded her 12-week CFRA entitlement. Respondent further asserts that by September 1, 1999, complainant knew respondent would no longer employ her as a manager, and that respondent had offered her another job, which she refused.

1. Complainant's Qualification for Leave

At hearing, the parties stipulated that respondent is a CFRA "covered employer" and complainant was an "eligible employee" under CFRA. (Gov. Code, §12945.2 , subds. (a), (b), and (c)(2)(A); Cal. Code Regs., tit. 2, §7297.0, subds. (d) and (e).)

The record also established that complainant had a "serious health condition" within the meaning of CFRA. (Gov. Code, §12945.2, subd. (c)(8); Cal. Code Regs., tit. 2, §7297.0, subd. (a).) CFRA defines "serious health condition" to include a physical condition that involves continuing treatment by a "health care provider." (Gov. Code, §12945.2, subd. (c)(8)(b).) Continuing treatment includes a period of inability to work "more than three consecutive calendar days," and any subsequent treatment "two or more times by a health care provider." (Cal. Code Regs., tit. 2, §7297.0, subd. (o)(2); 29 C.F.R. §825.114, subd. (a)(2)(i)(A).) [4]

Here, complainant had thrombophlebitis—an inflammation of the veins. Due to her thrombophlebitis, complainant was unable to work from July 24, 1999, until September 1, 1999. Complainant saw Dr. Eva Jalkotzy for treatment, received intravenous antibiotics at Oroville Hospital, and saw nurse practitioner Kim Hanson. This constitutes "continuing treatment by a health care provider" within the meaning of CFRA.[5] Thus, complainant had a qualifying "serious health condition" that made her unable to work or otherwise perform the essential functions of her position. (Gov. Code, §12945.2, subd. (c)(3)(C); Cal. Code Regs., tit. 2, §7297.0, subd. (o)(2).)

In sum, respondent was a CFRA "covered employer" and complainant was an eligible employee with a "serious health condition" that made her unable to work. Complainant, therefore, qualified for CFRA leave.

[4] Commission regulations that define "serious health condition" and "health care provider" incorporate by reference the federal Family and Medical Leave Act (FMLA), 29 U.S.C. §2601, et seq. and its implementing regulations, to the extent that they are not inconsistent with CFRA and Commission regulations. (Cal. Code Regs., tit. 2, §§7297.0, subds. (j) and (o), and 7297.10.) Thus, when consistent and where pertinent, FMLA regulations have been referenced in this discussion of CFRA.

[5] Health care providers include physicians and nurse practitioners. (Gov. Code, §12945.2, subd. (c)(6); Cal. Code Regs., tit. 2, §7297.0, subd. (j); 29 C.F.R. §825.118, subds. (a)(1) and (a)(2).)

2. Calculation of Leave Entitlement

Respondent asserts that complainant exceeded her CFRA leave entitlement. Using a 1999 calendar year, respondent argues that complainant's two leaves for her Baker's cysts, coupled with her leave for thrombophlebitis, exceeded 12 weeks and therefore complainant was not entitled to reinstatement. The Department argues that respondent's calculations are inaccurate and, in any event, complainant did not exhaust her entitlement to leave per the applicable 12-month period.

Notably, while the parties agree that complainant took three leaves in 1999, the record contains conflicting and inconclusive evidence on the precise number of weeks complainant was on leave. Nonetheless, in the calendar year of 1999, each of complainant's leaves was approximately one month and, under any calculations, totaled an excess of 12 weeks for that calendar year.[6] For the reasons set forth below, however, complainant had not exhausted her right to leave at the time respondent terminated her employment.

a. Applicable 12-month Period

Under CFRA, an eligible employee is entitled to take up to 12 weeks of leave in "any twelve month period." (Cal. Code Regs., tit. 2, §7297.3, subd. (b); 29 C.F.R. §825.200.) The 12-month period can be based on any fixed 12-month period, including the calendar year, fiscal year or "a year starting on an employee's 'anniversary' date." (Cal. Code Regs., tit. 2, §§7297.3, subd. (b), and 7297.10; 29 C.F.R. §825.200, subd. (b).) If an employer does not select which period should be used, "the option that provides the most beneficial outcome to the employee will be used." (29 C.F.R. §825.200, subd. (e).)

In this case, complainant's anniversary date is August 1994, when she began working for respondent. The respondent did not designate what 12-month period should be used. Thus, the most favorable date—complainant's anniversary date of August 1999—will apply rather than the calendar year. During the period from August 1, 1999, through complainant's attempt to return to work on September 1, 1999, complainant only took approximately four weeks of leave. This did not exceed complainant's CFRA leave entitlement and, accordingly, respondent was legally obligated to return complainant to her same or comparable position.

b. Effect of Failure to Designate Leave

The Department also argues an additional theory, asserting that even if the 1999 calendar year is used as the pertinent 12-month period, complainant did not exceed her 12-

[6] Based upon the testimony of Judy Cottingham and the complainant, as well as respondent's work schedule sheets, complainant may have missed anywhere between 13 and 19 weeks of work during the 1999 calendar year. The evidence is inconclusive on how many workweeks were taken as CFRA-related leave. For example, on direct examination, Cottingham's calculations were based upon the number of days complainant's name was not listed on respondent's work schedule sheets. On cross-examination, Cottingham conceded that complainant may have worked some of those days or may have been away from work for non-medical reasons.

week entitlement because respondent did not inform complainant of her CFRA rights or designate any of her leave as CFRA leave.

Commission's regulations require an employer to designate the leave as CFRA-qualifying in order for the leave to count against an employee's 12-week entitlement. The regulations provide:

> (A) Under all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as CFRA or CFRA/FMLA qualifying, based on information provided by the employee or the employee's spokesperson, and to give notice of the designation to the employee.
>
> (B) Employers may not retroactively designate leave as "CFRA leave" after the employee has returned to work, except under those same circumstances provided for in FMLA and its implementing regulations for retroactively counting leave as "FMLA leave." (Cal. Code Regs., tit. 2, §7297.4, subds. (a)(1)(A) and (B).)

FMLA regulations state that if an employer:

> [f]ails to designate the leave as FMLA leave…the employer may not designate leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation. In such circumstances, the employee is subject to the full protections of the Act, but none of the absences preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement. (29 C.F.R. §825.208, subd. (c).)

It is undisputed that respondent did not notify complainant of her CFRA rights or designate any of her leave as CFRA leave at any time before or during complainant's leaves. In addition, respondent demonstrated no permissible justification for retroactive designation.[7] Thus, complainant did not exhaust her 12-week CFRA leave entitlement in the calendar year of 1999.

Nonetheless, respondent argues that "leave is leave," citing federal cases which hold that failure to designate a leave as FMLA should not result in allowing an employee to take more than 12 weeks of leave. While federal authority is in conflict on this question, [8] there

[7] The only circumstances allowing retroactive designation after an employee returns to work, as set forth in FMLA regulations, are when an employer does not know whether the employee had a serious health condition or the employer is unable to confirm that the leave is CFRA-qualifying. (29 C.F.R. §825.208, subd. (e).)

[8] Notably, the United States Supreme Court has granted review of *Ragsdale v. Wolverine Worldwide Inc.* (8th Cir. 2000) 218 F.3d 933, 939, No 00-6029, cert. granted June 25, 2001, in which the Eighth Circuit concluded that

are significant policy reasons for not allowing absences preceding an employer's designation to be counted against the employee's CFRA entitlement. Statutes such as CFRA and FMLA, which establish mandatory leave entitlements, are designed to "protect employees from adverse employment decisions based on the employee's serious health condition involving continuing treatment." (*Rowe v. Laidlaw Transit Inc.* (9th Cir. 2001) 244 F.3d 1115, 1118.) These statutes create an affirmative obligation for covered employers to provide leave to qualified employees. To be meaningful, there is a corresponding employer duty to put an employee on notice when an exercise of his or her rights may result in adverse action against the employee. This type of notice—such as designating a leave as CFRA-qualifying—informs the employee of the nature and maximum duration of the allowed leave. As a result, the employee can make informed decisions about matters such as when to return to work, and, in doing so, minimize the adverse repercussions of taking the leave, such as losing one's job.

Here, respondent did not designate complainant's leave as CFRA leave and terminated her employment when she attempted to return from the leave. Had complainant been on notice through designation of her leaves, she may have chosen to return to work earlier. Respondent cannot now assert that complainant exceeded her CFRA entitlement because respondent failed to designate her leave as CFRA.

3. Respondent's Notice of Complainant's Need for a Leave

Respondent next argues that it did not receive sufficient notice of complainant's need for a leave of absence. Commission regulations provide:

> An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs CFRA-qualifying leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under CFRA or FMLA, or even mention CFRA or FMLA, to meet the notice requirement; however, the employee must state the reason the leave is needed, such as, for example, the expected birth of a child or for medical treatment. The employer should inquire further of the employee if it is necessary to have more information about whether CFRA leave is being sought by the employee and obtain the necessary details of the leave to be taken. (Cal. Code Regs., tit. 2, §7297.4, subd. (a)(1).)

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12 weeks is the "maximum" leave an employer must provide even if there is no designation and invalidated a contrary FMLA regulation. The Eighth Circuit holding is in line with the Eleventh Circuit. (*See Gregor v. Autozone, Inc.* (11th Cir. 1999) 180 F.3d 1305.) The Sixth and Ninth Circuits take a contrary position. (*Plant v. Morton Int'l, Inc*. (6th Cir. 2000) 212 F.3d 929, 934-36; *Rowe v. Laidlaw Transit, Inc.* (9th Cir. 2001) 244 F.3d 1115, 1118.)

In this case, respondent knew about complainant's medical condition prior to her leave and encouraged her to seek treatment. The record also shows that after seeking medical advice, complainant told respondent that she would need time off for her condition. After obtaining this information, respondent did not seek additional information about the leave. Under these circumstances, respondent had sufficient notice of complainant's need for a CFRA leave.

4. Obligation to Return Complainant to the Same or Comparable Position

Respondent next argues that it offered complainant a bookkeeping position, which she refused. The Department argues that respondent did not offer complainant her position as manager and did not offer her a comparable position.

An employer has the duty, upon granting a leave request, to guarantee "employment in the same or a comparable position." (Gov. Code, §12945.2, subd. (a); Cal. Code Regs., tit. 2, §7297.2, subd. (a).). Employment in the same or a comparable position "means employment in a position that has the same or similar duties and pay that can be performed at the same or similar geographic location as the position held prior to the leave." (Gov. Code, §12945.2, subd. (c)(4); Cal. Code Regs., tit. 2, §7297.0, subd. (g).)

Here, respondent was unwilling to return complainant to her previous manager's position and, instead, wanted complainant to retire. Respondent suggested that complainant might handle some of the bookkeeping upon retirement, but never specified how much complainant would earn, how often she would work, or where the work would be done. This does not constitute an offer to return complainant to a "comparable position."

5. Exception for Top 10 Percent of Salaried Employees

Finally, respondent asserts that complainant was among the top 10 percent of its employees, so it need not guarantee complainant reinstatement to her position. Under Government Code section 12945.2, subdivision (r)(1)(A), a CFRA covered employer may refuse to reinstate a salaried employee who is "among the highest paid 10 percent" to his or her same or comparable position. [9] To establish this exception, the employer must show that the refusal to reinstate the employee is necessary to prevent "substantial and grievous economic injury to the operations of the employer," and that the employer notified "the employee of the intent to refuse reinstatement at the time the employer determines the refusal is necessary. . . ." (Gov. Code, §12945.2, subd. (r)(1)(B) and (C); Cal. Code Regs., tit. 2, §7297.2, subd. (c)(2).)

Here, there was no evidence that complainant was in the top 10 percent of respondent's paid employees. Moreover, respondent did not prove that a refusal to reinstate

[9] Government Code section 12945.2, subdivision (r)(1)(A), defines such an individual as "a salaried employee who is among the highest paid 10 percent of the employer's employees who are employed within 75 miles of the worksite at which that employee is employed."

complainant would cause "substantial and grievous economic injury" to its operations or that respondent followed the proper notice procedure, as required by Commission regulations. Thus, this argument fails.

Therefore, respondent's failure to reinstate complainant to her same or a comparable position on September 1, 1999, was unlawful, in violation of CFRA, Government Code section 12945.2, subdivision (a).

B. Discrimination Based on Disability

1. Perceived Disability

FEHA provides that it is an unlawful employment practice for an employer to discharge an employee from employment because of the employee's physical disability, unless excused by a lawful defense. (Gov. Code, §12940, subd. (a).) The Department asserts that respondent violated FEHA by terminating complainant's employment because of a perceived disability. Respondent did not specifically address this allegation in closing argument. For the following reasons, this decision finds that respondent unlawfully terminated complainant on the basis of a perceived disability, in violation of Government Code 12940, subdivision (a).

In 1999, FEHA's statutory provisions expressly provided that the term "physical disability" included having a physiological disease, disorder, or condition, which: 1) affects one or more body systems, including the neurological, immunological, musculoskeletal, respiratory, or cardiovascular system; and 2) limits an individual's ability to participate in major life activities. (Former Gov. Code, §12926, subd. (k)(1).) The Act further provided that "[b]eing regarded as having or having had" such a disease or disorder also constituted a "physical disability" under the Act. (Former Gov. Code, §§12926, subd. (k)(3), and 12940, subd. (a).)

Here, respondent erroneously perceived that complainant had a condition which would end her life. John McKay testified that after visiting complainant in Oroville Hospital, he thought complainant had a "terminal" condition. McKay further testified that he thought complainant would die from a blood clot if she returned to work. The evidence also showed that McKay conveyed these beliefs to Keith Holmes and Judy Cottingham and they concluded that complainant should no longer work as a manager at Oroville Cassidy's. Thus, complainant had a perceived disability within the meaning of the Act.[10]

[10] On January 1, 2001, the Prudence Kay Poppink Act ("Poppink Act") (former A.B. 2222) became law [Stats. 2000, ch. 1049], amending California's disability discrimination provisions. Currently, there is a conflict in the appellate courts about whether the Poppink Act is retroactive. (*Compare Wittkopf v. County of Los* Angeles (2001) __Cal.App. __ (Poppink Act amendments to the definition of physical disability clarify existing law and have no "retrospective effect"] and *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245 [assuming the Poppink Act "represents a legislative attempt to clarify the existing statute, it would apply to cases which predate its passage"] *with Colmenares v. Braemer Country Club, Inc.* (2001) 89 Cal. App.4th 778 [Poppink Act not retroactive].) This decision need not reach the question of whether the Poppink Act is retroactive, however, because

2. Discrimination

Discrimination is established if a preponderance of the evidence demonstrates a causal connection between complainant's perceived disability and her termination by respondent. The evidence need not demonstrate that complainant's perceived disability was the sole or even the dominant cause of her termination. Discrimination is established if the perceived disability was one of the factors that influenced respondent. (*Dept. Fair Empl. & Hous. v. Silver Arrow Express, Inc*. (1997) No. 97-12, CEB 2, p. 6 ; *Dept. Fair Empl. & Hous. v. Aluminum Precision Products, Inc.* (1988) No. 88-05, FEHC Precedential Decs. 1988-1989, CEB 4, p. 3.)

The preponderance of evidence established that complainant's perceived disability was a factor in respondent's termination of her employment. On September 1, 1999, the date of complainant's termination, John McKay told complainant that she was being terminated because of her health. At hearing, when McKay was asked why he thought complainant could not continue as a manager, he stated, "I felt it was terminal. I thought you were going to die, Sherry." McKay further testified that he and Keith Holmes made their decision not to keep complainant on as a manager "[b]ecause of her [complainant's] legs." Moreover, Judy Cottingham also testified that complainant was removed from her job because of complainant's medical problems. Thus, the Department established that complainant's perceived disability was a factor in respondent's decision to terminate complainant.

3. Defenses

An employer will not be held liable for discrimination if it establishes an affirmative defense by a preponderance of evidence. Government Code section 12940, subdivision (a)(1), provides that it is not unlawful for an employer to discharge an employee with a disability where the employee, because of his or her disability, is unable to perform his or her essential duties, even with reasonable accommodation, or cannot perform those duties in a manner which would not endanger his or her health or safety or the health and safety of others. (*Raytheon Co. v. FEHC* (1989) 212 Cal.App.3d 1242, 1252; *Sterling Transit Co. v. FEPC* (1981) 121 Cal.App.3d 791, 798; Cal. Code Regs., tit. 2, §7293.8, subd. (d).)

The record did not establish any affirmative defense. Rather, the evidence showed that by September 1, 1999, complainant had received a medical release that allowed her to return to work without restrictions. Nonetheless, respondent terminated complainant because of a belief that complainant could not work due to her condition.

Respondent's motivation is perhaps best reflected in a conversation among complainant's son, James Ritchey, John McKay and Keith Holmes about complainant's termination. During that conversation, Holmes and McKay said they were afraid

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under the pre-Poppink Act provisions, complainant had a perceived disability.

complainant would reinjure herself, despite Ritchey making clear that complainant's doctor disagreed. Thus, respondent terminated complainant based upon speculation that, as a result of her past condition, complainant would be unable to perform her duties in the future. This type of speculation, unsupported by medical expertise, cannot establish a defense under the Act. (*See Sterling Transit Co. v. FEPC, supra,* 121 Cal.App.3d at 799 [employer's evidence only showed a possibility that the individual with a disability might endanger his health sometime in the future; such conjecture did not justify refusal to employ the individual].) Therefore, the evidence has not established an affirmative defense under Government Code section 12940, subdivision (a)(1).

In conclusion, the record showed that respondent terminated complainant on the basis of a perceived disability, in violation of Government Code section 12940, subdivision (a).[11]

Remedy

The Department's amended accusation sought back pay, out-of-pocket costs, compensatory damages for emotional distress, an administrative fine, and affirmative relief. Having established that respondent violated complainant's CFRA rights and discriminated against her in violation of the Act, the Department is entitled to whatever forms of relief are necessary to make complainant whole for any loss or injury she suffered as a result of such discrimination. The Department must establish, where necessary, the nature and extent of the resultant injury, and respondent must establish any bar or excuse it asserts to any part of these remedies. (Gov. Code, §12970, subd. (a); Cal. Code Regs., tit. 2, §7286.9; *Donald Schriver, Inc. v. Fair Empl. & Hous. Com.* (1986) 220 Cal.App.3d 396, 407; *Dept. Fair Empl. & Hous. v. Madera County* (1990) No. 90-03, FEHC Precedential Decs. 1990-1991,CEB 1, pp. 33-34.)

A. Make-Whole Relief

1. Back Pay

Complainant is entitled to receive back pay for the wages she otherwise could have been expected to earn but for respondent's discrimination. *(Donald Schriver, Inc. v. Fair Employment & Housing Com., supra*, 220 Cal.App.3d at p. 407.) Respondent has the burden of proving by a preponderance of the evidence that no wages are due to complainant for

[11] Several additional issues are raised by the parties' closing arguments. First, while the Department's amended accusation alleged that respondent denied complainant reasonable accommodation for her physical disability, the Department did not assert this theory in closing argument. Instead, the Department argued complainant was ready and able to return to work without restrictions or limitations. Thus, the issue of reasonable accommodation will not be discussed in this decision.

The Department also argued in closing argument that respondent failed to take all reasonable steps necessary to prevent discrimination from occurring. Yet, the Department did not plead this as a separate violation in the accusation or first amended accusation, and it will not be addressed here.

Finally, respondent's closing argument suggests that there may have been some irregularities in complainant's receipt of unemployment insurance or state disability benefits. The record, however, did not establish that this was the case.

some or all of the back pay period, and of proving any offsets to an award of back pay. (Gov. Code, §12970, subd. (a); *Dept. Fair Empl. & Hous. v. J & J, King of Beepers* (1999) No. 99-02, FEHC Precedential Decs. 1998-1999, CEB 1, p. 25; *Dept. Fair Empl. & Hous. v. Madera County, supra*, CEB 1, at pp. 36-37; *Dept. Fair Empl. & Hous. v. Del Mar Avionics, Inc.* (1985) No. 85-19, FEHC Precedential Decs. 1984-1985, CEB 16, pp. 26-27.)

The parties stipulated that at the time of her termination, complainant earned a salary of $2000 per month, with an average bonus of $140 per month. The record showed that complainant received unemployment insurance for six months after her termination and sought work during that period.[12] The evidence of complainant's work search after her unemployment ended, however, was insufficient to prove that she mitigated her back pay damages during that time. Also, while the parties stipulated to the average amount of complainant's monthly bonus, there was an insufficient showing that complainant would have received this bonus had she remained employed by respondent.

Based upon this evidence, complainant will be awarded $12,000 in back pay for the six-month period when she was on unemployment. Interest will accrue on this amount, at the rate of ten percent per year, compounded annually, from the effective date of this decision until the date of payment. (Code Civ. Proc., §685.010.)

2. Out of Pocket Losses

The Department also seeks out-of-pocket expenses for the storage fees incurred as a result of complainant's move to Sacramento. The record did not sufficiently establish the connection between complainant's termination and her move to Sacramento. Therefore, these damages will not be awarded.

3. Compensatory Damages for Emotional Distress

The Department requests that respondent be ordered to pay complainant the maximum amount of damages for emotional distress and administrative fines, asking that the larger award be allocated to emotional distress damages. At the time of the acts alleged herein, the Commission had the authority to award actual damages for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses in an amount not to exceed, in combination with any administrative fines imposed, $50,000 per aggrieved person per respondent. (Gov. Code, §12970, subd. (a)(3).)[13]

In determining whether to award damages for emotional injuries, and the amount of any award for these damages, the Commission considers relevant evidence of the effects of discrimination on the aggrieved person with respect to: physical and mental well-being; personal integrity, dignity, and privacy; ability to work, earn a living, and advance in his or

[12] Unemployment benefits do not offset a back pay award. (Cal. Code Regs., tit. 2, §7286.9(a)(1)(A).)

[13] Effective January 1, 2000, the Legislature raised the $50,000 limit for emotional distress/administrative fines in employment cases to $150,000 per complainant per respondent. (Gov. Code, §12970, subd. (a)(3).)

her career; personal and professional reputation; family relationships; and, access to the job and ability to associate with peers and coworkers. The duration of the emotional injury and the egregiousness of the discriminatory practice are also factors to be considered. (Gov. Code, §12970, subd. (b); *Dept. Fair Empl. & Hous. v. Aluminum Precision Products, Inc., supra,* CEB 4 at pp. 8-10.)

The record is replete with evidence on both the immediate and long term adverse effects of respondent's termination of complainant's employment. Fired by people she considered "family" who would take care of her, complainant was a "basket case" and did not "feel human." Devastated and in disbelief, complainant withdrew from others. She became depressed, unhappy, angry and hurt. The termination of her employment was particularly difficult because complainant's life had revolved around her work at Oroville Cassidy's.

As time progressed, respondent's conduct further harmed complainant's mental well being. Complainant was no longer the independent, self-sufficient person she had been, instead depending upon friends for shelter and other assistance. Complainant's self-esteem plummeted, in part because she did not understand why respondent had terminated her and blamed herself. Complainant's personality, behavior and relationship with family and friends changed. Depressed and withdrawn, she became very different from the previously energetic, outgoing, "people person" she had been, whose life was grounded by a job she liked and other activities such as playing with her grandchild or visiting friends. While complainant has taken steps to change her life, such as attending courses to enhance her computer skills, as of the date of hearing, complainant remained withdrawn and unhappy.

Considering the facts of this case in light of the factors set forth in Government Code section 12970, subdivision (a)(3), the Commission will order respondent to pay complainant $45,000 in damages for her emotional distress. Interest will accrue on this amount, at the rate of ten percent per year, compounded annually, from the effective date of this decision until the date of payment. (Code Civ. Proc., §685.010.)

B. Administrative Fine

The Department seeks an order of an administrative fine. The Commission has the authority to order administrative fines where it finds, by clear and convincing evidence, a respondent guilty of oppression, fraud, or malice, express or implied, as required by Civil Code section 3294. (Gov. Code, §12970, subd. (d).) The monies derived from any administrative fine award are to be deposited in the state's General Fund. (Gov. Code, §12970, subd. (d).)

In determining the appropriate amount of an administrative fine to award, the Commission shall consider relevant evidence of, including but not limited to, the following: willful, intentional or purposeful conduct; refusal to prevent or eliminate discrimination; conscious disregard for the rights of employees; commission of unlawful conduct;

intimidation or harassment; conduct without just cause or excuse; and multiple violations of the Act. (Gov. Code, §12970, subd. (d).)

Here, John McKay and Keith Holmes willfully and purposefully decided to remove complainant from her position as manager after she sought treatment for her thrombophlebitis. They did not reconsider this decision, despite complainant's expressed desire to return to work as manager, her son's statement to them that complainant was medically able to return to work, and a written medical release provided to respondent which stated that complainant could return to work by September 1, 1999, without any restrictions. The Commission finds that this conduct is inexcusable, and in conscious disregard of complainants' rights in light of respondent's legal obligations under FEHA. Therefore, the Commission will order respondent to pay an administrative fine of $5,000. The administrative fine shall be paid to the state's General Fund (Gov. Code, §12970, subd. (d).) Interest will accrue on this amount, at a rate of ten percent per year compounded annually, from the effective date of this decision until the date of payment. (Code. Civ. Proc., §685.010, subd. (a).)

C. Affirmative Relief

In its amended accusation and in closing argument, the Department asks that respondent: 1) be ordered to develop CFRA and disability discrimination policies; 2) conduct training on these policies; 3) post a notice that respondent violated the Act; and, 4) order any further relief that the Commission deems appropriate. Where suitable, these additional forms of relief are authorized by the Act. (Gov. Code, §12970, subd. (a)(5).)

Respondent will be ordered to post a notice acknowledging respondent's unlawful conduct. (Attachment A.) Respondent also will be ordered to develop and circulate CFRA and disability discrimination policies to its employees, and provide training for its managers and supervisors. Further, respondent will be ordered to post a copy of the Commission's notice regarding CFRA leave and disability discrimination. (Cal. Code of Regs., tit. 2, §7297.9, subd. (a).) (Attachment B.)

ORDER

1. Respondent Holmes Management, Inc., dba Cassidy's Family Restaurant, shall immediately cease and desist from denying its employees their rights under the California Family Rights Act, Government Code section 12945.2, and under the disability discrimination provisions of the Fair Employment and Housing Act, Government Code sections 12926 and 12940.

2. Within 60 days of the effective date of this decision, respondent Holmes Management, Inc., dba Cassidy's Family Restaurant shall pay to complainant Sherry Ritchey back pay in the amount of $12,000 for lost wages for the period from September 1, 1999, through March 1, 2000. Respondent shall also pay 10 percent per year interest on this amount, running from the effective date of this decision, and compounded annually, until the date of payment.

3. Within 60 days of the effective date of this decision, respondent Holmes Management, Inc., dba Cassidy's Family Restaurant, shall pay to complainant Sherry Ritchey compensatory damages for emotional distress in the amount of $45,000 together with interest on this amount running from the effective date of this decision to the date of payment and compounded annually at the rate of ten percent per year.

4. Within 60 days of the effective date of this decision, respondent Holmes Management, Inc., dba Cassidy's Family Restaurant, shall pay to the state's General Fund an administrative fine in the amount of $5,000, together with interest on this amount running from the effective date of this decision to the date of payment and compounded annually at the rate of ten percent per year.

5. Within 10 days of the effective date of this decision, an authorized representative of respondent Holmes Management, Inc., dba Cassidy's Family Restaurant shall complete, sign and post clear and legible copies of notices conforming to Attachments A and B. Copies conforming to Attachments A and B shall be posted in respondent's California restaurants where its employees will see them and where applicants for jobs obtain or file applications for employment. Posted copies of these notices shall not be reduced in size, defaced, altered, or covered by other material. The notice conforming to Attachment A shall be posted for a period of 90 working days. All copies conforming to Attachment B shall be posted permanently. In addition, respondent shall give a copy of Attachment B to all of its California employees.

6. Within 60 days after the effective date of this decision, respondent Holmes Management, Inc., dba Cassidy's Family Restaurant shall develop and circulate CFRA and disability discrimination policies to all of its employees and shall conduct a training program for all of its managers and supervisors on its CFRA and disability discrimination policies.

7. Within 70 days after the effective date of this decision, an authorized representative of respondent Holmes Management, Inc., dba Cassidy's Family Restaurant, shall, in writing, notify the Department and the Commission of the nature of its compliance with paragraphs two through five of this order.

The Commission designates as precedential the portion of this decision entitled CFRA Leave, pages 9 to 15 of this decision. This designation is made pursuant to Government Code section 12935, subdivision (h), and California Code of Regulations, tit. 2, §7435, subdivision (a).

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523 and Code of Civil Procedure section 1094.5 and Cal. Code of Regs., tit. 2, §7437. Any petition for judicial review and related papers should be served on the Department, Commission, respondent, and complainant.

DATED: January 10, 2002

GEORGE WOOLVERTON	LISA DUARTE
CATHERINE F. HALLINAN	JOSEPH JULIAN
HERSCHEL ROSENTHAL	ANNE RONCE

Attachment A

Holmes Management, Inc., dba Cassidy's Family Restaurant

NOTICE TO ALL EMPLOYEES AND APPLICANTS

Posted by Order of the
FAIR EMPLOYMENT AND HOUSING COMMISSION
An agency of the State of California

After a full hearing, the California Fair Employment and Housing Commission has found that Holmes Management, Inc., dba Cassidy's Family Restaurant is liable for a violation of the California Family Rights Act (CFRA) (Gov. Code, §12945.2, subd. (a)), and for discrimination of the basis of an employee's perceived disability. (Gov. Code, §12940, subd. (a).) (*Dept. Fair Empl. & Hous. v. Holmes Management, Inc., dba Cassidy's Family Restaurant* (2001) No.02-08-P.)

As a result of the violations, Holmes Management, Inc., dba Cassidy's Family Restaurant has been ordered to post this notice and to take the following actions:

1. Cease and desist from violating employees' and/or applicants' rights under CFRA and under the disability discrimination provisions of the Fair Employment and Housing Act.

2. Pay the former employee back pay and compensatory damages for emotional distress.

3. Pay an administrative fine to the state's General Fund.

4. Post a statement of employees' and applicants' rights and remedies regarding CFRA and disability discrimination, develop policies on these rights and conduct a training about these rights.

Dated: _____ By: _____
Authorized Representative for Holmes Management, Inc., dba Cassidy's Family Restaurant

THIS NOTICE IS REQUIRED TO BE POSTED UNDER PENALTY OF LAW BY THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION. IT SHALL REMAIN POSTED FOR NINETY (90) CONSECUTIVE WORKING DAYS FROM THE DATE OF POSTING AND SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY WAY THAT HINDERS ITS VISIBILITY.

Attachment B

FAMILY CARE AND MEDICAL LEAVE (CFRA) AND DISABILITY DISCRIMINATION

Under the California Family Rights Act of 1993 (CFRA), if you have more than 12 months of service with us and have worked at least 1,250 hours in the 12-month period before the date you want to begin your leave, you may have a right to an unpaid family care or medical leave (CFRA leave). This leave may be up to 12 workweeks in a 12-month period for the birth, adoption, or foster care placement of your child or for your own serious health condition or that of your child, parent or spouse. CFRA contains a guarantee of reinstatement to the same or to a comparable position at the end of the leave, subject to any defense allowed under the law.

If possible you must provide at least 30 days advance notice for foreseeable events (such as the expected birth of a child or a planned medical treatment for yourself or of a family member). For events which are unforeseeable, we need you to notify us, at least verbally, as soon as you learn of the need for the leave.

We may require certification from your health care provider before allowing you a leave for your own serious health condition or certification from the health care provider of your child, parent, or spouse who has a serious health condition before allowing you a leave. When medically necessary, leave may be taken on an intermittent or a reduced work schedule.

In addition to your rights under CFRA, you are also entitled to be free from discrimination on the basis of an actual or perceived disability. If, because of your actual or perceived disability, an employer refuses to hire or promote you, fails to provide reasonable accommodation that is not an undue hardship, retaliates against you, terminates your employment, or otherwise discriminates against you in your terms and conditions of employment, that employer may have violated the Fair Employment and Housing Act.

If you feel that any of these illegal practices have happened to you, or that you have been retaliated against because you opposed these practices, you have one year to file a complaint with the state Department of Fair Employment and Housing, at (800) 884-1684.

The Department will investigate your complaint. If the complaint has merit, the Department will attempt to resolve it. If no resolution is possible, the Department may prosecute the case with its own attorney before the Fair Employment and Housing Commission. The Commission may order the unlawful activity to stop, and require your employer to reinstate you, pay back wages and other out-of-pocket

losses, damages for emotional injury, an administrative fine, and give other appropriate relief. You may retain your own attorney to take your case to court.

Dated:

_____

Authorized Representative for Holmes Management,Inc., dba Cassidy's Family Restaurant

THIS NOTICE IS REQUIRED TO BE POSTED UNDER PENALTY OF LAW BY THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION. IT SHALL BE POSTED INDEFINITELY, AND SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY WAY THAT HINDERS ITS VISIBILITY.